IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GRETCHEN S. STUART, M.D., et al.,	*	
Plaintiffs,	*	Case No. 1:11CV804
vs.	*	
JANICE E. HUFF, M.D., et al.,	*	Greensboro, North Carolina August 23, 2013 9:30 a.m.
Defendants.	*	

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TRANSCRIPT OF SUMMARY JUDGMENT MOTION HEARING
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Good morning. I'm sorry I had to move it up to 9:30, but I take it you all got the word. We're having a naturalization ceremony in here this afternoon and we have to be out of the way and all the other courtrooms were actually full.

All right. I'm ready to hear your arguments on the cross motions for summary judgment. I've reviewed, of course, all the briefs which were filed some time ago and then the supplemental briefs, and then I looked at your submissions on the facts, which I appreciate and found that helpful.

Everybody filed motions, so I don't know -- I'll just let the Plaintiff go first and let you all go back and forth until you start repeating yourselves. Okay.

Go ahead.

MS. RIKELMAN: Thank you, Your Honor. May it please the Court, my name is Julie Rikelman and I'll be arguing on behalf of the Plaintiffs this morning.

I wanted to begin today by discussing the claims that are left before the Court. The Plaintiffs have moved for summary judgment on all three claims in our latest amended complaint: The Plaintiff's First Amendment claim; the patient substantive due process claim, and; then the physician's vagueness challenges.

The parties' summary judgment briefing, however, has greatly narrowed the issues on the vagueness claim. The State has proposed savings construction of all of the statutory language that is at issue.

THE COURT: They proposed what kind of --

MS. RIKELMAN: Savings.

THE COURT: Savings, okay.

MS. RIKELMAN: Yes. And we agree that their constructions are reasonable, Your Honor, so if they were adopted by the Court, they would resolve our vagueness challenges.

For that reason, I wanted to focus today on the remaining claims, and in particular the physicians' First Amendment claim. The physicians have challenged the "Display of Real-Time View Requirement" in the statute. As Your Honor is aware, this requirement mandates that, on penalty of losing their medical licenses, physicians must do the following:

They must display and describe in detail the ultrasound image to every patient seeking an abortion even if she says no, and even if the physician thinks that doing so will harm that particular patient;

The physicians must display and describe the images while the patient is captive on an examination table during the ultrasound procedure and partially undressed,

and;

Then they must force the patient to wait at least four hours before proceeding with the abortion.

This is the requirement that we contend violates the First Amendment, because it requires physicians personally and in their own voice to communicate the State's anti-abortion message.

I wanted to focus my comments today about the First Amendment on the questions that the Court raised to the parties during the August 1 telephonic conference and I heard the Court ask at least three questions:

First, how a ruling in this case fits into the context of healthcare regulation overall;

Second, Your Honor asked the parties to address the *Lakey* and *Rounds* decisions, and;

Third, Your Honor asked the parties to talk about the recent decisions from the Fourth Circuit.

So I'm going to go ahead and do that by starting with your question about how this case fits into the context of healthcare regulation overall and in particular, how compelled speech fits into that context.

Your Honor, a ruling for Plaintiff on our First Amendment claim is crucial to protecting the practice of medicine and making sure that states are not allowed to use physicians as puppets to communicate their ideological

messages. Fortunately, this law is highly unusual, so a ruling in our favor also will not jeopardize healthcare regulation in general, nor will it jeopardize informed consent law in particular.

As the Court recognized in the preliminary injunction ruling, this law goes well beyond the traditional requirements of informed consent laws, and Plaintiffs submit that it's not an informed consent law at all for at least two reasons.

First, the requirement is performative rather than informative. According to the State, a physician can comply with the requirement even if no information is communicated whatsoever. The structure of the statute itself establishes this. The requirement says that a woman can close her eyes and cover her ears to drown out the speech and yet still give legally valid informed consent to the procedure, but the physician has to go on speaking and displaying in order not to lose his or her medical license.

Indeed, this is how the State self-described the requirement in paragraph 15 of its submission of the undisputed material facts, and I'm quoting here. "If the patient states that she does not want to see the ultrasound images, hear the fetal heartbeat or hear the description and explanation concerning the ultrasound images, she may avert her eyes from the ultrasound screen. Furthermore, the

abortion provider may provide the patient with eye blinders and earphones so that as a practical matter she may avoid seeing and hearing the ultrasound images, the fetal heartbeat and/or the description and explanation concerning the ultrasound images."

So under this requirement, Your Honor, a patient would be lying on an examination table with blinders around her head, earphones on her ears, and a physician would be standing on the other side of the blinders displaying and describing the ultrasound images to no one at all.

We submit that this is not an interaction for informed consent purposes; instead, it's a perversion of the informed consent process.

Second, this requirement is inconsistent with how informed consent has traditionally been regulated. There is no exception in this law whatsoever for physician judgment, so the physician has to proceed even if he or she, in her best medical judgment, thinks that doing so will harm the patient. Indeed, striking this requirement as unconstitutional under the First Amendment would be consistent with other federal court rulings on physician speech, such as the Ninth Circuit's decision in the *Conant* case and the recent *Wollschlaeger* decision.

To remind the Court, in *Conant* the Ninth Circuit struck down a law that prohibited physicians from

recommending the use of medical marijuana to certain seriously ill patients, such as cancer patients. The Ninth Circuit in that decision recognized that physician speech can be entitled to the strongest protection under the First Amendment that the Constitution allows; that the law at issue altered the traditional role of physicians in the medical system by prohibiting speech that was necessary to the proper functioning of that system, and it distinguished *Casey* on the ground that the law had no therapeutic privilege exception and therefore physicians were precluded from using their medical judgment, just as is the case here.

In *Wollschlaeger*, a Federal District Court in Florida struck down a law that prevented physicians from asking their patients about guns in the home and from recording that information in their medical record unless it was directly relevant to their medical care.

The *Wollschlaeger* Court explicitly rejected the State's invitation to apply only limited review to the law at issue, saying that it was a content-based restriction on speech and it would have to be subject to heightened review.

The Court recognized that the law would chill practitioner's speech in a way that impairs the provision of medical care overall and could harm patients. The Court also found that the law would fail either strict or intermediate scrutiny because there were less restrictive

alternatives that were available.

These decisions support our claim in this case, Your Honor, because they treat physician speech as subject to heightened scrutiny under the First Amendment, just as Your Honor did in the preliminary injunction ruling.

I wanted to turn now to the *Lakey* and *Rounds* decisions, the second question that Your Honor posed. Plaintiffs respectfully submit that those cases were wrongly decided. However, only the *Lakey* decision is squarely on point here because the law at issue in *Rounds* was materially different in several key respects. Our briefing did address these cases in detail, Your Honor, so I just wanted to emphasize a few points this morning.

First, even the Eighth Circuit in the *Rounds* decision recognized that the State cannot use physicians simply to communicate ideological messages. It recognized that ideological speech is different, but in our view, it erred in concluding that the speech required in that case was not ideological.

Second, both *Lakey* and *Rounds* made the crucial error of conflating the undue burden standard discussed in *Casey* with the First Amendment standard. This Court has already recognized that as a mistake in its preliminary injunction ruling because the Supreme Court itself in *Casey* treated and analyzed those claims separately.

Our physicians' First Amendment claim here should be evaluated under First Amendment standards. There is no undo burden claim in this case.

Third, both of these decisions essentially treat *Casey* as having created an abortion exception to the First Amendment, and the State in this case goes even further and suggests that *Casey* actually created a physician exception to the First Amendment.

Both of these readings are inconsistent with *Casey* itself and would set extremely dangerous precedents for the State's ability to use physicians as its puppets.

The law at issue in *Casey* was qualitatively different from the "Display of Real-Time View Requirement," and what the Supreme Court said about the Pennsylvania law was actually quite limited. The informed consent law at issue in *Casey* did only two things.

One, it required by statute that physicians inform patients about the risks of the abortion procedure, the risks of any alternatives, and the gestational age of the pregnancy. What's crucial is understanding that the lower Court decision in that case made clear that the plaintiffs -- the plaintiff physicians were already providing that information to their patients. The physicians had no objection to providing the information and thus they were not even unwilling speakers.

Their only challenge to that part of the law was that it required them personally to deliver the information rather than using their trained counselors, which had been their practice up to that point.

Second, the law in *Casey* required physicians to offer to their patients written materials prepared by the State about embryonic and fetal development, but it was up to the woman to decide whether to accept this offer and the physicians only had to actually provide the materials if the woman said yes. And, of course, importantly, all of the informed consent requirements at issue in *Casey* were subject to the physician judgment exception. The doctors didn't even need to offer the State's written materials if they believed that doing so would harm a particular patient.

The privilege -- the exception that they had in that case said that if, in the physician's good-faith medical judgment, the physician concluded that making the offering, the information would result in severely adverse affects on the physical or mental health of the patient, the physician did not have to do it.

And the Supreme Court noted this exception and found it important, saying that the statute therefore did not prevent a physician from exercising his or her medical judgment, which is, of course, exactly what the "Display of Real-Time View Requirement" does here.

For all of these reasons, the informed consent law at issue in *Casey* could reasonably be considered to have only an incidental effect on physician speech and therefore be subject to very limited review under the First Amendment. That simply can't be said of the "Display of Real-Time View Requirement."

Casey does not answer the question posed in this case, which is whether a law that forces physicians personally and in their own voice to deliver a government message in the middle of a medical procedure is consistent with the First Amendment. The Court should look to traditional First Amendment case law to answer that question, just as it did in its preliminary injunction ruling, and that case law makes clear the requirement is unconstitutional.

Finally, Your Honor, I wanted to respond to your question about the Fourth Circuit's recent decisions. As we explained in our supplemental briefing, we believe that the recent decisions support our First Amendment claim here for a few reasons:

First, the Fourth Circuit emphasized the context is crucial to determining the appropriate level of scrutiny for compelled speech. Here, for all the reasons we argued in our briefing, the context makes clear that the compelled speech is ideological;

Second, in both *Baltimore CPC* and *Centro Tepeyac*, the Fourth Circuit confirmed that strict scrutiny is generally appropriate for content-based regulations of speech, including compelled speech, and;

Third, the Court confirmed that even commercial speech, if it's inextricably intertwined with otherwise fully protected speech, should also be subject to strict scrutiny.

Finally, in *Centro Tepeyac*, the Fourth Circuit upheld a preliminary injunction ruling that a compelled speech requirement likely violated strict scrutiny on facts that are much less intrusive on individual rights than the facts at issue here.

In *Centro Tepeyac*, the ordinance at issue only required Crisis Pregnancy Center employees to post signs on their premises. No one was required to personally, in their own voice, speak the government's message.

We also think that other recent appellate court decisions support our First Amendment claim in this case.

The Tenth Circuit's recent decision in *Cressman* and the D.C. Circuit's decision in the *NLRB* case squarely hold that the First Amendment's protection against compelled speech applies to compelled facts, as well as to ideological speech.

And for all of these reasons, Your Honor, we

believe the "Display of Real-Time View Requirement" violates well-established First Amendment law; that the Court was correct in its preliminary injunction ruling, and; that the Court should block the requirement permanently.

I'm happy to answer any other questions the Court may have or to reserve time --

THE COURT: You mentioned your due process -- you know, that you had three arguments: the First Amendment argument, the patient's due process argument. So can you just go over with me the patient's due process argument that you're making?

MS. RIKELMAN: Yes, Your Honor. The argument on behalf of our patients is that the requirement is irrational, especially as applied to patients who refuse to see or hear.

As we explained in our briefing, if there's no information being communicated to the patient whatsoever, if there are earphones on her ears and blinders around her head, then the quality of the informed consent is not being improved and, in fact, the State's only witness in this case conceded that. So particularly as applied to that group of patients, Your Honor, the requirement can't even pass rational basis, and that's the heart of our claim.

THE COURT: All right. Thank you.

MS. RIKELMAN: Thank you very much.

THE COURT: For the State?

MR. HICKS: Yes, Your Honor. My name is Faison Hicks. I'm a Special Deputy Attorney General with the North Carolina Department of Justice and I represent the State.

Your Honor, I'd like to begin by responding to some of the points made by opposing counsel, beginning with the very last point.

I thought I heard opposing counsel say, with respect to the Plaintiffs' patients due process claim, that the essence of their argument is that -- they were critical of the argument that the woman can cover her eyes and ears because, in their view, if the woman covers her eyes and ears the fact is not an informed-consent law, what's the rational basis for it.

And it seems to me, Your Honor, that the whole point of giving the woman the opportunity to close her eyes and ears, in other words, to -- to specifically permit a physician's office to equip itself with equipment that will enable the woman to not see and not hear the message that's going to be offered to her, is in anticipation of the very complaints that we've heard in this case; that women will be -- will be, if not tortured, will be -- will be made extraordinarily uncomfortable by hearing this message.

And it seems to me, seems to the State, that the

Plaintiffs can't have it both ways here. The State is simply -- and I think the General Assembly was simply trying to make it possible for -- for the act to follow a middle course to say: For those patients who are willing to look, the message should be offered.

I mean, I had a physician's appointment on Monday of this week and I -- I knew what my physician was going to say. I did not want to hear it. I was even tempted to simply skip the session, but I decided to be a man about it and just go and hear it. Sometimes we just have to hear what is not pleasant to hear, and some people can do that and some people cannot.

And I think the State's view, the General Assembly's view, was to give the patient a choice. Now, surely being reasonable like that should not make the statute constitutionally infirm.

The Plaintiffs also take the position, if I heard correctly, that the Act compels the physicians to make speech that is an anti-abortion speech and that is ideological in nature.

Your Honor, I don't -- the State doesn't want to concede this point. This is an informed consent to the abortion statute.

Now, if -- if someone in this room wants to start guessing about what -- about the subjective,

inside-the-heart-and-mind motivations of one or more members of the General Assembly in enacting this law or some other law, have at it. It seems to me that's a feckless exercise. Who knows what the motivations of some or all of these people were.

The Act purports, by its own language, to be an informed consent statute. It is not fanciful to imagine that this type of informed consent is necessary and serves a valuable purpose, no less an authority, than the highest court of our country.

The United States Supreme Court in the *Casey* case has said, and has now put it beyond dispute by anybody, that if a woman has an abortion and only later, after the abortion, learns for the first time the true implications of what she did, she may suffer severe psychological consequences. In other words, she may be injured in a medical sense. So there is a risk, a health risk, at issue here.

The General Assembly was not fanciful in imaging informed -- the subject of informed consent needed to be dealt with in this context, therefore, the State does not for a second concede that the message conveyed -- required to be conveyed by the Act is ideological or that it's antiabortion.

We obviously don't believe that *Lakey* was wrongly

decided, Your Honor. We think that -- I mean, look, we believe that *Lakey* reads *Casey* exactly the way we read *Casey,* and we think it's an entirely fair reading and we agree with the Plaintiff that it's on point. The statute there is very close to our statute. The *Rounds* case we believe is also very close to our case.

What we see, Your Honor, in a few words, is this; that the Supreme Court in *Casey*, as we argued some time ago when we appeared in the first place -- the Supreme Court in *Casey* said essentially this:

That informed consent to abortion laws may constitutionally compel physicians and other abortion healthcare providers to make disclosures of information, in other words, may compel speech, provided that the speech is truthful and not misleading, provided that the speech is really relevant to the woman's decision about whether to have an abortion --

THE COURT: So right there.

MR. HICKS: Yes, ma'am.

THE COURT: "Really relevant to the woman's decision." If she can cover her eyes and cover her ears, stop up her ears, how can it be relevant if she doesn't have to listen to it?

MR. HICKS: I would -- my answer to that would be that if she -- if she is the sort of person who has --

obviously, if she closes her eyes and ears, she's the sort of person who has said to herself, Damn the torpedoes. Full speed ahead. I don't want to hear this. I have some vision in my mind of what this is going to be. Either I don't want to hear it or I can't take it, or I want the outcome that I seek so badly that I don't want to know what I may be doing because it may prevent me from doing it.

That does not make it irrelevant. It means that she has her own reasons that she believes are compelling for not hearing it.

The State has said, perhaps reluctantly, I don't know, we will respect that. We are not going to force her against her will to hear this. We are going to set -- we're going to take what we think is a reasonable course. We're going to offer up the information if she wants to receive it, but we're not going to cram it down her throat.

And, Judge, I mean, it seems to me it would be -- it would be bizarre for the State to have said otherwise. This is the only reasonable thing to do and it doesn't strike me that it's something that the Plaintiffs ought to be heard to complain about simply because it is reasonable.

I don't know if I've answered your question, but I've answered it to the best of my ability, Your Honor.

THE COURT: Well --

MR. HICKS: Your Honor, the third thing the

Supreme Court said in *Casey* in terms of laying out those situations where States may constitutionally compel speech that relates to informed consent about abortion was this: The ultimate brake, as in an automobile brake, on what States may and may not do is this. They may not, in the guise of erecting a law having to do with informed consent to abortion, create as a practical matter an obstacle -- a substantial obstacle to a women's ability to obtain an abortion.

I don't think that there's a serious argument that this statute creates a substantial obstacle to a woman's ability to obtain an abortion. What it seems to me and what I think it seems to the State that it does is to require that those women who elect to hear and see the information offered, it will require that they make the decision in perhaps an even more sober, judicious, and reflective context. That's what I -- at least I think the Act can be read reasonably to -- to be intending that.

THE COURT: Can you address their argument that *Casey* is distinguishable because the statute in Pennsylvania had a therapeutic exception and this one doesn't?

MR. HICKS: I'm not sure I understand your question, Your Honor. The exception that you're talking about was what?

THE COURT: Well, their argument -- I don't know

that I can --

MR. HICKS: I'm sorry. I couldn't hear a good deal of their argument.

THE COURT: Oh, okay.

MR. HICKS: I'm at the age where I'm not hearing as well.

THE COURT: I understood them to say that *Casey* was distinguishable because the Pennsylvania statute at issue had an exception even to requiring physicians to give the patient the written materials prepared by the State if the physician in his or her medical judgment thought that that would be harmful to the patient.

Maybe I've summarized it -- did I summarize that reasonably accurately?

MS. RIKELMAN: Yes, Your Honor.

THE COURT: Okay. And that that makes *Casey* at least distinguishable from this case, which forces the patient to lie there while this information is spoken and shown even if the patient doesn't want to see or hear it and takes steps not to see or hear it.

MR. HICKS: I guess my response is multi-fold.

One, I don't recall the *Casey* Court's -- the plurality decision being based upon that. I don't recall -- and I'm pretty confident about this, Judge, that the Court didn't base its decision on that.

Two, I thought -- and, again, I had a hard time hearing just because I'm an old man now. It's painful to admit that I don't hear the way I used to. I had a hard time hearing, but I thought I heard opposing counsel say that, at least in the Plaintiffs' view, the *Casey* court really didn't deal with compelled speech at all because the plaintiff physicians in *Casey* were perfectly happy to give the -- the information that the Pennsylvania statute mandated and, in fact, said to the Court, We're giving this already and there's really no dispute here.

I don't know that I read *Casey* that way, but that's what I thought I heard.

THE COURT: I believe what I heard them say is that that is -- you can find that information in the opinions of the -- either the Circuit Court or the District Court.

MR. HICKS: Okay. All right. Then I was going to say, if that's the case, then maybe -- you know, maybe their view of the case is that wasn't a compelled speech case at all. It seems to me that it is. I think I read *Casey* different from them and I think the answer to your question is just that I don't believe for a second that the plurality decision in *Casey* turned in any way, shape, or form on the presence of a therapeutic exception to the Pennsylvania statute. I think you had exactly the same decision from the

plurality with a concurrence by the other members if this statute had been before the Court, or certainly if this statute were before the Court now.

THE COURT: Okay.

MR. HICKS: May I go on, Your Honor?

THE COURT: Yes, proceed.

MR. HICKS: Just briefly with respect to the three Fourth Circuit cases. Of course, both sides have briefed these and you've read what the State thinks about these, but to summarize, I want -- I want to be up front and candid with the Court.

My initial reaction about all three cases was, Gee, these cases are so different from the facts here that they have what I think is snippets that are really enticing that I just wanted to jump all over and say, Oh, yeah, we win. And I'm sure the Plaintiffs had the same view, because there are snippets to go around for everybody.

But to be honest with you, I didn't think that those cases really -- I think they stirred the hash rather than adding meat, I guess, is what I think.

THE COURT: I think you might actually agree with Plaintiffs' counsel on that point. I think you all think those cases are not particularly helpful.

MR. HICKS: Well, you know, I do think this, Your Honor. Having made that disclosure to you so you know I'm

trying to be as candid as I can be, I don't think it is insignificant that the Fourth Circuit has now said in two cases, both the first case, the case decided in February, and in one of the two July cases, I think *Centro Tepeyac* in a footnote, that it has said that, look, there is this professional speech doctrine out there, and where -- where a professional or even a nonprofessional, but certainly a physician or a lawyer, receives payment and is engaged in a private advice setting with a patient or a client, then the State may reasonably regulate the -- what the physician or the attorney or pharmacist or whoever it is, what he or she says.

And indeed there are lots and lots of cases out there that uphold the constitutionality of compelled speech in that context. I do think that's significant.

I was disappointed, of course, that the February decision decided by the Supreme Court, the *Moore-King* case, was -- dealt with fortunetellers rather than physicians. That's regrettable, although I must also say that the Court, I believe, if I remember correctly, it analogized the telling of the future to a physician's diagnoses and an attorney's advice to clients about what the law may be. The Court actually said that.

I do not believe -- to be candid again, I don't believe the Court had abortion in mind when it was talking

about this. I don't know for a fact that the Court would actually have said what it -- would have -- it might have spoken more cautiously if it had had that in mind.

So I -- to answer the question that you asked us about in your July 9 Order, I don't know that I attach an enormous amount of significance to any of the three cases. They have some fascinating snippets.

I still believe that *Casey* is the -- is the primary precedent, primary paradigm for the decision in this case. The fact that it has now -- the fact that the State's view of *Casey* has now been upheld or affirmed, if you will, by two other courts of appeal, one sitting *en banc*, says to me that the State has a pretty reasonable view of *Casey* and I -- in any case, beyond that, you asked counsel to comment upon how we thought -- if I understood you correctly, your decision in this case might affect the regulation of medicine and the practice of medicine, healthcare.

THE COURT: Well, just generally how -- how this -- you know, the legislature's role in regulating the practice of medicine and, you know, some of your -- one of your statements in the recent submissions -- I think you said informed consent practices are not matters to be determined by private practitioners, doctors as a whole, but are matters that can only be defined if described by the legislative branch of the State government, which I

actually --

MR. HICKS: And I added to that, I think, Your Honor, by saying, in effect, as checked up on by federal district courts.

THE COURT: Right, subject to constitutional requirements. And that's -- I guess kind of my question is, you know, just not everything is about abortion and --

MR. HICKS: Right. Yes, ma'am.

THE COURT: -- and so obviously the State can regulate the practice of medicine to some degree, but, you know, there's all kinds of disputes out there in the world about whatever the fillings are that some dentists think are good ideas and other dentists think are very harmful and, you know, what -- I just am trying to understand what has to exist before the State can regulate the details of the -- this, you know, providing care to a patient because the legislature is not doctors, usually. I mean, maybe there may be some.

MR. HICKS: Yes, ma'am.

THE COURT: It's not researchers with doctorates in molecular biology who know about what causes cancer. I mean, they -- you know, but they certainly have their role. So just how far if they were to -- how far -- when and -- can they do this and -- you know, because the way it's certainly been done for a while is in fact by standard of

care, which is, in fact, practitioners establishing the -- what is required for informed consent.

MR. HICKS: And courts do.

THE COURT: And courts too.

MR. HICKS: It's really court dominated, I would argue.

THE COURT: That's true. But courts imposing some informed consent, but then what is required for informed consent is usually established by standard of care; at least that's true in North Carolina.

I know there's some -- you know, a fair amount of variety around the states. I'm just trying to put this into context here. If, you know, a state legislature decided -- I'll just have to make something up that would be maybe ridiculous. But they decide having your gallbladder removed increased your risk of Alzheimer's, and there was one study that supported that and a million that said that's ridiculous, but the legislature decided, well, doctors have to tell their patients this. You know --

MR. HICKS: Yes, ma'am.

THE COURT: -- I'm not trying to make up a ridiculous situation.

MR. HICKS: I understand.

THE COURT: I'm just trying to understand what are the outside limits of this because it goes without saying

that legislatures and state government or federal governments can regulate this to some extent, but what about the other end? Where does -- where can they not do it? And I guess that's what I'm trying to figure out and understand.

MR. HICKS: Well, I guess I would say, Your Honor, that -- that's a big question, but I guess I would say that I remember when President Clinton's healthcare initiative was placed before Congress. I remember hearing on NPR that at that point -- that was a long time ago -- that the -- the healthcare delivery system in the United States in terms of annual dollars spent represented fully one-sixth of our entire economy. I'm sure it's more than that now. It's one of the most heavily regulated fields of commerce in the United States.

Anybody who has ever -- any lawyer who has ever worked on it, it's just breathtaking the amount of regulation, not just from the United States Government but from every state, and some cities have -- I mean, New York City where I used to live and practice law has boatloads of regulations over the delivery of healthcare. And -- since President Roosevelt, it's just been like that, and; if anything, the role of government - federal, state and local - has grown every year, not decreased to the point where I think that this has now just become a tradition.

And I think the other thing that's going to cause

this to become even more of an issue is that -- that various governments are now paying so much to physicians and other healthcare providers to provide healthcare that there's always a quid pro quo and -- and -- so I -- my guess is if you ask the government at any level how far can this go, the government would say, well, pretty far, and it's going to go pretty far, I think they would say, as long as we're tolling out taxpayer dollars.

But I think, Judge, the other thing is that the Judicial branch of both the United States government and the state governments, for an even longer period of time, have played a very active role, perhaps without intending to, in regulating the -- the dispensing of healthcare in this country through tort lawsuits, not just about the standard of care but about -- well, yes, about the standard -- about whether this or that act or omission was reasonable under particular factual circumstances.

And, again, that's -- it's inevitable that's going to evolve as our civilization does and as we have -- as our ideas about what is reasonable change; as we become more affluent, the idea of what is reasonable is going to expand.

Now, what is the point at which the General Assembly, for example, just clearly can't get involved in this? I mean, could the General Assembly enact a law tomorrow that would say a gallbladder is a spleen? Gee, I

don't know. I mean, I -- I guess my -- and I have not thought this through, Your Honor, so don't hold this too much against me. But I guess my initial take on that is there is a political mechanism in place, a very reliable political mechanism in place, that can deal with these sorts of problems that you're talking about that exist at the margins, and it's elections. If -- and this happens sometimes.

There's a mayor in San Diego who is all over the news because he won't quit after he did something dreadful and has admitted that he did it and simply won't be a man about it and be contrite and say, You're right, I quit. And if he doesn't quit, you know, he's going to quit when the voters send him home.

And so -- and, you know, I -- I think there is a natural disincentive therefore for political parties, whichever ones they are, and for individuals who are members of legislative bodies or who are -- who are running agencies of government, at the state and federal level, to enact or promulgate kooky laws or kooky legislation that will end up incurring the ire and the wrath of a lot of people, and it seems to me in that sense that that's a problem that probably largely takes care of itself.

As I drove here this morning, I was really struggling to think how could the adjudication of the issues

before the Court today end up creating a -- or throwing a real monkey wrench into the government's regulation of the healthcare industry, either in North Carolina or in the United States, and I don't think that the Court's decision in this case stands any greater chance of doing that than the Court's decision in a lot of other cases that deal with the healthcare industry in one aspect or another.

As this Court knows better than most people, abortion is simply a hot-button topic and there's -- there's nary an abortion regulation or statute that doesn't get challenged by somebody. People feel strongly about it. It's just one of those subjects and people on both sides feel strongly, but I don't know that that means that it's going to have a really great significance for the delivery of healthcare.

I don't think my -- I'm not sure my answer has been of much use to you, but that's the best I can do, Judge.

THE COURT: Okay.

MR. HICKS: As to the *Pruitt* case, Your Honor, I have a very elemental understanding of the decision. It appears to me that the Supreme Court has actually sent back to Oklahoma, back to the Court there, that decision for further proceedings. I gather that --

THE COURT: You're talking -- that's the Oklahoma

case?

MR. HICKS: Yes, ma'am.

THE COURT: Maybe I'm wrong. I thought there were two Oklahoma cases, and one of them they sent back and the other one they still have pending. They're nodding yes. I can't remember.

MR. HICKS: I'll be able to talk to you about the one they've sent back. I'm not sure that I can intelligently talk to you about the other. I would be thrilled to have the opportunity to submit a 10-page brief on it or 5-page brief, if that would be helpful to the Court.

THE COURT: Well, the one -- the opinion that I read in the one they didn't send back, the one that is still pending, it doesn't really say anything. It rules. It says -- basically, I think it said it was unconstitutional, whatever the statute was in Oklahoma, but it didn't really explain.

MR. HICKS: Would the Court like to receive some sort of small, short but thoughtful brief from the parties on this?

THE COURT: Well, I'll think about that. I don't know. *Pruitt* and -- is *Pruitt* the one that was remanded to the Oklahoma Supreme Court?

MR. HICKS: I think so, Your Honor.

THE COURT: Okay. Then the other one must have been called something else. I can't remember the name of it. Maybe the Plaintiffs will remember.

MR. HICKS: I hope it was called something else. I'll feel some better because I couldn't find it.

THE COURT: All right. Well, let me think about that before I ask you to do it, because --

MR. HICKS: And, Your Honor, I feel badly I haven't taken fully an hour.

THE COURT: That's okay.

MR. HICKS: I think that's really all I had to say to the Court today.

THE COURT: I'm usually not unhappy when people take less time.

MR. HICKS: Thank you, Your Honor.

THE COURT: All right. Thank you.

Rebuttal for the Plaintiff?

MS. RIKELMAN: Thank you, Your Honor. Let me just start actually at the very end, just very quickly.

The case that was sent back to the Oklahoma Supreme Court was not the ultrasound case. It was the other case. It's a case called *Cline*. And Your Honor is correct that there was a ruling by the Oklahoma Supreme Court striking down a similar Oklahoma law as unconstitutional. The State of Oklahoma sought cert. The Supreme Court has

not ruled on the cert petition.

THE COURT: That one is *Pruitt* that was not remanded.

MS. RIKELMAN: Correct.

THE COURT: And -- but do I remember correctly? I remember looking at the decision in *Pruitt* and thinking -- I mean, it just doesn't really say anything, right?

MS. RIKELMAN: It is brief, Your Honor, yes.

THE COURT: And there was no opinion from a Court of Appeals in Oklahoma?

MS. RIKELMAN: There was not an opinion from the Court of Appeals. There's an equally brief opinion from the Oklahoma trial court in the case.

THE COURT: Okay. All right.

MS. RIKELMAN: So, Your Honor, I just wanted to address a few points that the State made.

First, the State argued, as it did in its brief, that this law is an offer law. Your Honor, we strenuously disagree with that. This is not an offer law.

The doctor is required to speak unless he or she wants to risk his or her medical license regardless of what the patient does. There's no choice for the patient other than to actively try and avoid the speech. And in fact, Your Honor, the State's own expert conceded that there is a significant difference between this law and an offer law.

Again, I just want to read from the joint submission of undisputed facts. This is Paragraph 14 quoting from the State's own expert. He said: There's a meaningful difference between, on the one hand, a physician offering a woman the ability to view an ultrasound and hear a simultaneous explanation, and; on the other hand, a physician placing a screen in her view, even over her objection, and describing the ultrasound, even over her objection, because one says the physician must do this. The other says they would just offer it.

This is not an offer law, Your Honor. We gave Your Honor several examples of offer laws in the briefing, such as from Mississippi and Virginia, and this law simply is not that. Unless the physician describes and displays their medical license is at issue.

The second point I wanted to respond to was the State's claim this is not ideological speech.

First of all, Your Honor, that claim does not have to do with the motivations of the legislature. It has to do with the text of the statute itself.

And I'd like to point out that, contrary to what the State says, the State itself does not purport that this is an informed consent law. In fact, the "Display of Real-Time View Requirement" is not in the portion of the statute that's entitled "Informed Consent." It's in a

freestanding portion of the statute.

And as I mentioned earlier, Your Honor, the woman does not have to receive any of the information about the ultrasound in order to give legally valid informed consent. So this is not an informed consent requirement.

In any event, the State labels about what the law is or does are not dispositive in the Court's First Amendment analysis. The Supreme Court has said that repeatedly and, of course, very clearly in the *Riley* case. And, Your Honor, the speech here we believe is clearly ideological for a number of reasons.

First, the doctor has to speak regardless of what the patient wants.

Second, the physician must provide the speech and display the images in the middle of a medical procedure when the woman is partially undressed on an examination table.

Third, the physician has to then force the woman to wait at least four hours before proceeding, and then again there's no exception. So the physician has to do it even if he or she thinks the patient will be harmed.

Something that the physician has to say and display regardless of what the patient wants and even if it's against the physician's medical judgment must be ideological, Your Honor.

The third point I wanted to address was the

State's argument that the plurality in the *Casey* decision didn't really care about the presence of a therapeutic privilege exception; that that wasn't important to the decision.

We disagree, Your Honor, and in fact if you look back at the *Casey* decision, in the section of the decision talking about the informed consent requirements, the plurality wrote very clearly:

"It is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions if he or she can demonstrate by a preponderance of the evidence that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient. In this respect, the statute does not prevent the physician from exercising his or her medical judgment."

And that's exactly what the statute does and that discussion is part of the informed consent discussion in *Casey* and precedes almost immediately the First Amendment discussion.

Next, Your Honor, the State raised the professional speech doctrine. As we discussed in our brief, Your Honor, the Supreme Court has actually applied heightened scrutiny to many cases involving speech by

professionals. Professional speech has many components which the Supreme Court has recognized and it applied heightened scrutiny in cases like *Riley*, *Velasquez*, *Sorrell*. All of those cases involve speech by professionals; and in fact in *Riley*, the professional speech was even a disclosure requirement and the Court still concluded that the requirement had to be subject to exacting scrutiny.

In general, the way the Courts have viewed the professional speech doctrine is in the case like the fortuneteller case, where there's a general licensing scheme that has only an incidental effect on speech. The Courts rightly recognize that that kind of licensing scheme does not need to be subject to heightened review under the First Amendment.

Next, Your Honor, the State tried to answer the question about what is the difference between the reasonable regulation of medicine and what we believe this law does. And I would submit, Your Honor, there's at least three lines that the Court can draw to distinguish this law.

First, again, the physician has to speak regardless of what the patient wants. The physician has to speak even against her medical judgment and the physician has to speak even if no information is communicated whatsoever. That is not the practice of medicine, Your Honor. If the physician can't exercise his or her medical

judgment and no information is being communicated, that is not an informed consent process.

THE COURT: So what if it were a statute where the legislature said before you can have chemo or radiation treatment, the doctor has to tell the patient certain things about the risks of that, which are substantial, and it had a similar kind of thing, you know, it required the doctor to speak it and it gave the patient this option of not listening to it? Would that be okay?

MS. RIKELMAN: Well, Your Honor, as you recognized in your preliminary injunction ruling, it's hard to know what level of scrutiny the Court would apply to a traditional informed consent requirement. I would argue the example you just gave is also not a traditional informed consent requirement because if the doctor is required to speak, even if the patient isn't listening, it's not informative. It's performative.

What is the point of making the physician engage in that performance unless what you're trying to do is punish the physician and the patient in some way? The point of informed consent is for the patient to receive information that actually improves the quality of the medical condition, but the State's own expert conceded that what's required here won't do that because somebody who has blinders around her head or earphones on her ears isn't

going to get any information and her decision making won't be improved at all.

If in your example the doctor had to provide information, there's -- and it was subject to scrutiny, perhaps it would survive depending on the means that the State was using to further its interests. Because, again, one of the key problems with the "Display of Real-Time View Requirement" is that there is a clear, less restrictive alternative, the offer law.

The State could require physicians to offer the display and the description to the patient, but then respect the patient's decision to say no and not require a physician to engage in the farce of speaking and displaying to no one at all.

And so it could be, Your Honor, that if an informed consent law required a physician to discuss with a patient, not in the middle of the chemotherapy procedure but in an office setting, certain risks, it could be that a law like that would survive intermediate scrutiny. This is not this law. This law is highly unusual and it's not an informed consent law at all, Your Honor.

I just wanted to end, unless the Court has any other questions, by reminding the Court that the only issue outstanding other than the summary judgment motions are Plaintiffs' motions to strike. If the Court has any

questions about that, my colleague, Andrew Beck, would be happy to answer them.

THE COURT: As I -- okay. Well, I will ask one question about that. As I understood your argument, it was based on failure to disclose, but then it appeared that they had in fact disclosed, so --

MR. BECK: Your Honor, in the e-mail disclosure, they did not mention their intent to rely upon these other documents. In the hard copy disclosure, they did, and Plaintiffs did not recognize the discrepancy between these two documents. But, Your Honor, they were required to produce expert reports for these doctors regardless.

It's not -- it's not up to Defendants to invent their own discovery protocols, and so if they wanted to rely these witnesses' testimony, they had to produce the reports that are required under Rule 26(a) -- (a)(2)(B). And so, in fact, it doesn't matter that they referenced them in that letter; you're not allowed to incorporate that by reference. The rules are clear, and under Rule 37(c)(1) the result that attaches when the parties fail to make those disclosures is also clear.

THE COURT: Did the affidavits themselves not really function like reports?

MR. BECK: They are missing, Your Honor, several key pieces of information that Rule 26(a)(2)(B) requires.

They don't list the cases in which these witnesses testified as experts in the previous four years. They contain no statement of compensation. They don't list any exhibits that will be used to support their opinions and at least one of the declarations doesn't list any of the facts or data that the witness relied upon to form his opinion.

And I would direct or ask Your Honor if you would look at the decision in *Carr versus Deeds* by the Fourth Circuit.

THE COURT: *Carr versus* --

MR. BECK: Sorry. *Carr*, C-a-r-r, *versus Deeds*. The citation -- it's cited in our brief, Your Honor.

THE COURT: Okay. It's been a while since I've actually looked at the motion to strike. I've been reading the rest of the stuff, so --

MR. BECK: I understand, Your Honor.

In *Carr versus Deeds*, the plaintiff attached to her complaint a document that contained some but not all of the information that's required under the Federal Rules and did not make a proper Rule 26(a)(2)(B) disclosure, and the Fourth Circuit held that it was properly excluded in that case; that the plaintiff couldn't rely on that evidence because, in the language of the Fourth Circuit, "every litigant in federal court is plainly entitled under Rule 26(a)(2)(B) to be given the information spelled out therein

and none should shoulder the burden to independently investigate and ferret out that information as best they can and at the expense of their client."

In that case as well, there was some information relevant to Rule 26(a)(2)(B) contained in the report but it was not complete, and the Fourth Circuit said, essentially, if you disobey the requirements of Rule 26(a)(2)(B) you do so at your peril. That was the language of the Court.

And so here -- we think the case is directly analogous here. Defendants aren't allowed to say, And by the way, we rely on these materials which themselves don't purport to be Rule 26(a)(2)(B) reports, which are missing critical pieces of information that 26(a)(2)(B) requires.

And so while Plaintiffs didn't recognize the discrepancy, it shouldn't be incumbent on Plaintiffs here to monitor Defendants' noncompliance with the Rule.

THE COURT: All right. Thank you.

All right. Mr. Hicks, do you want to address both parts of -- if there's anything else you want to say on the underlying, the merits, or the motion to strike?

MR. HICKS: If you don't mind, I'll take it from the last comments they made and go backward. I'll remember it better that way.

THE COURT: Okay.

MR. HICKS: Your Honor, it was my understanding

under the Court's July 9 order that we would be here to argue the cross motions for summary judgment and to inform the Court about our thoughts concerning the Fourth Circuit's three 2013 cases, as well as the other matters that -- that you talked to us about on the telephone. I, to be honest with you, was caught totally unaware there would be a discussion about a motion to strike.

The discovery in this matter was handled by one of my colleagues, Stephanie Brennan, who has been off of this case and, in fact, she works for a totally different client. She's not able to work on this case. She's been off it for quite a while. I just can't argue the matter, Your Honor. I don't know the first thing about it.

THE COURT: That's fine. You briefed it. It's been fully briefed, so I'm -- and really the question I had about it was for the Plaintiff.

MR. HICKS: Okay.

THE COURT: I understood you-all's argument.

MR. HICKS: Very well. Your Honor, I would say this. I represent a client -- well, for 25 years I was in private practice and I represented private parties. Now I represent the People and I would ask Your Honor that the People not be prejudiced if I have done something or failed to do something that I should have done, and I would ask the Court to allow the People's evidence and the People's

witnesses to be heard, unless there's been some significant prejudice to the other side.

Your Honor, as to the -- the other matters that were stated by opposing counsel, it just seems to me to be silly to say that what the Act requires the physicians in this case to convey renders them non-physicians or it makes what they're doing not the practice of medicine. That's silly.

There are lots and lots and lots of laws - court-made laws and statutory laws, federal and state - that require healthcare providers, including physicians and surgeons, to say very specific things to patients and others. In fact, to parents, to the police, to DHSS, lots of folks. And to say, Oh, well that's not the practice of medicine, or that's not the practice of law and so we can completely get around this statute, to me, that's just sophistry. I don't think that's a correct way to go at this.

It seems to me this clearly is and involves the practice of medicine, the practice of medicine for a fee, incidentally, as I'm sure you saw in the proposed undisputed and disputed findings. And -- and the fact that Dr. Bowes thinks that there's not a meaningful difference -- I can't quote or even paraphrase what he said now, but it was quoted or paraphrased by opposing counsel, to me is really neither

here nor there.

What matters is what the duly constituting, lawmaking body that is charged with the responsibility for deciding what legal informed consent believes is meaningful and relevant and what patients need to hear. And then once they have passed those laws, it's necessary for their laws to come before courts like this for a very sober and judicious determination of whether those laws comply with all of our constitutional requirements and that's happening here in the way it's supposed to happen, and I just don't think that's up to Dr. Bowes or the Plaintiffs to decide that.

In fact, the logic of their opposition, and you can see this clearly in reading the joint submission, is that physicians ought to really be able to say to the Courts, This is the way it's going to be. Now, lawyers can't do that and we shouldn't -- we shouldn't attempt to do that. The State Bar which regulates us is an agency of the government.

Now, to be sure, lawyers have a tremendous involvement with it. The State Bar Council is almost all lawyers. The medical society, too, is an agency of the state government. The government in the end has to make these decisions about what is and isn't informed consent, what's necessary and what's not necessary. Of course --

THE COURT: Well, that goes back to my question to you about the science underlying it all.

MR. HICKS: About the what?

THE COURT: The science underlying it all, you know, and when medical judgment is appropriate and --

MR. HICKS: Well, see, I guess my answer to that is this -- a couple of things.

One -- forgive the advocate in me, but, you know, the *Casey* Court has said something that we're now all stuck with, and that is that if a woman undergoes an abortion and only later realizes the implications of what she did, only later realizes what she actually did, she may be severely psychologically injured. That's now a fact as far as everyone in this courtroom is concerned.

So there is a legitimate interest that -- that a legislature has in protecting its citizens from that type of harm; and there's a nexus, a pretty clear one, between laws like this and a State's desire to simply protect the health of its people.

But, two, in answer to your question, what are the limits on what the General Assembly can do, and I guess, you know, what do -- what role do physicians play in that. I am just a citizen. I'm not an expert at this, but I'm absolutely sure this is true at the level of the United States government and I'm confident it's true at the level

of our state government and other state governments. People from industry - and in this case people from the profession of physicians and surgeons and other healthcare providers - regularly and routinely appear before the General Assembly and offer their opinions, sometimes their testimony. They offer testimony all the time to the Congress under oath.

With the General Assembly, it's been my experience it's not been so often under oath, but they frequently appear and tell the members of the General Assembly, who are members of this and that committee that are considering this and that piece of legislation, what their perspective is, and they also make written submissions to members of the General Assembly that say, Look, this is kooky. The gallbladder is the gallbladder. It ain't the spleen. Now, don't pass a bill that says the gallbladder is the spleen. You'd be killing people.

That is a process that has always gone on. It goes on now. I'm sure it will always go on, and it's an important process.

Look, let's not act like -- let's not stick our head in the sand. Physicians and surgeons are represented by a very powerful, very well-funded, highly organized lobby in the United States Congress, in the General Assembly in Raleigh, and I suspect in every legislature in every other state in this country. I mean, they're very -- their flag

might as well be the "Don't Tread On Me" flag.

This is not a group that can't get its voices heard; and if they believe that the General Assembly is about to do something or has done something that is just cockamamie, that is scientifically cockamamie or that is contrary to the interest of patients, I think the Court has every reason to believe that they --

THE COURT: So what I hear you saying - you made that argument before and you're making it now - is that there are no First Amendment restrictions on State regulation of doctors in their treatment of patients. That's what --

MR. HICKS: I'm sorry. There's no -- I just want to be sure I --

THE COURT: There's no First Amendment -- the First Amendment basically just doesn't apply to protect any -- to protect physicians in their communications with their patients; that physicians have no First Amendment rights. That's what it sounds like you're saying.

MR. HICKS: Well, it may sound that way, Your Honor, but given --

THE COURT: That's not what you're saying?

MR. HICKS: -- that it's not necessary to answer that question in this case. To me, it would be reckless for me to venture an answer to that. I really don't know.

What I am absolutely confident of is that in a case where a legislature has simply looked at a situation where there's a logical connection between the reality that the Supreme Court has observed, that there's this health risk out there and a law that says, you know, what I think is a pretty reasonable way physicians ought to offer to provide this informed consent information; if the woman for whatever reason doesn't want to receive it, we're going to respect her right not to receive it.

THE COURT: Well, I understand that argument, but what I heard you saying when you got -- started talking about the legislature and elections and lobbying, it sounded like you were saying there's a political process for this and --

MR. HICKS: There is.

THE COURT: -- physicians have no First Amendment rights.

MR. HICKS: I didn't say physicians have no First Amendment rights.

THE COURT: Okay. Because that's kind of what -- I mean, I was asking what the outside range is and your answer appeared to be --

MR. HICKS: I don't know.

THE COURT: -- there is no outside range, they don't have any First Amendment rights.

MR. HICKS: Let me be clear. I don't know the outside range.

I mean, look, I've been a lawyer long enough to know that there will always be another fact pattern that's going to come out and surprise us all, one that I just couldn't foresee. And, Your Honor, to be candid with you, I'm so focused on this case, this fact pattern that, as my maid used to say, I ain't much studying on what might be coming up tomorrow. So I don't know that I really know the answer to your question and I would not want to stake myself out that physicians don't have rights of any kind, but I am saying this. This is not a group of people who are powerless in the society.

It's a group of people who are highly organized, well funded, a good group of people. I'm glad they are all those things, but they are -- their voices are regularly and routinely heard, and they're highly expert.

And my guess is that the General Assembly and the Congress routinely and regularly seek the advice and counsel of these experts when it decides to venture into the realm of enacting legislation that will affect the healthcare system, because they're just as concerned as you are about how all -- whatever it is I'm about to do will affect the delivery of healthcare services in this country because everybody knows that's important to everybody.

Have I answered the Court's question?

THE COURT: I -- you know, I understand your answer.

MR. HICKS: That's the best I can answer.

THE COURT: I understand your answer.

MR. HICKS: Thank you. I think that's maybe the best I can answer.

Your Honor, I would want to offer up one other thought. As you know from hearing my argument this morning and all those many months ago, the State is persuaded more now, I'd say, than even before that the *Casey* court, the *Lakey* court -- *Lakey* decision and the decision in *Rounds* mandate that -- mandate the outcome here and mandate that the Act here be held to be constitutional. We think that the preliminary injunction ought to be lifted and that the Act ought to be declared constitutional.

However, if the Court were to disagree with the State on this, bearing in mind that there is a severability clause in the statute, the State believes that it would be unwise, improper, and -- and gratuitous if the Court did not fashion an Order that said that even though I'm enjoining -- permanently enjoining the enforcement of the statute, I'm -- in effect, physicians still have to at least offer to give this information to the patient.

If the patient says, I don't want it, then they --

they don't have to do the description, they don't have to do the sonogram, they don't have to do all the rest.

THE COURT: All right.

MR. HICKS: And that is definitely not what I'm asking the Court to do. That's what I'm saying I would consider to be a loss, but -- but -- at a bear minimum we would ask that, Your Honor.

THE COURT: All right. Thank you.

MR. HICKS: Thank you, Your Honor.

THE COURT: Anything else you haven't already said?

MS. RIKELMAN: May I very briefly, Your Honor?

THE COURT: Uh-huh.

MS. RIKELMAN: Your Honor, physicians do not lose their First Amendment rights when they begin practicing medicine and in fact the Ninth Circuit recognized in *Velasquez* that it's very important for physicians to maintain those rights in order for the practice of medicine to function appropriately. It has never been part of the regulation of medicine in the United States to require physicians personally to communicate the State's ideological messages. That's not part of the history in this country.

The State certainly does have an interest in potential life, which *Casey* recognized, but the State cannot compel doctors to communicate that personally and in their

own voice against their will, and there's nothing in *Casey* that says that the State can do that.

And, Your Honor, the interest in potential life can absolutely be met with a clearly less restrictive alternative, which is an offer law, which a number of other jurisdictions have passed and that is available and, since the State chose the most restrictive means here rather than the least, the law should be struck down.

And with respect to the State's last point, we do not believe that there's any way to turn this law, which requires the doctor to speak no matter what if he or she doesn't want to lose her medical license, into an offer law. That would require rewriting the statute, which the Court is not in a position to do under the case law.

Thank you very much, Your Honor. I have nothing further.

THE COURT: All right. Thank you all very much.

You know, I had held off on this pending those two July Fourth Circuit opinions because I thought they might be more helpful than they ended up being, but I'm -- it may -- it's not going to be tomorrow. I do not have the case ready to come out. I'm going to consider your arguments and think about it a little further. I hope not to be too terribly much longer, but I'm sure it will take me several weeks, at a minimum, to finish it.

So if anything -- I would just invite you -- if something does happen with some other case out there that gets decided, you're certainly free to submit just a citation to the case, a supplemental -- suggestion of supplemental authority and I would welcome that, particularly if it's out of circuit.

I keep up with the Fourth Circuit pretty well and I don't guess we'll hear anything from the Supreme Court until October. Anything out of any other circuit, certainly I would welcome that. I believe all the cases you all cited to me today are in your materials so -- and I can find all of them.

I appreciate you being here today and we're out well in time to let the naturalization ceremony go forward. So thank you for that.

Court is adjourned.

MR. HICKS: Thank you, Your Honor. We appreciate it.

MS. RIKELMAN: Thank you, Your Honor.

(Proceedings concluded at 10:45 a.m.)

C E R T I F I C A T E

I, LORI RUSSELL, RMR, CRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Lori Russell

Lori Russell, RMR, CRR
Official Court Reporter

Date: 9-9-13